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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/787,253	02/26/2004	David D. Ladd		1316

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EXAMINER	
MAHAFKEY, KELLY J	
ART UNIT	PAPER NUMBER
1794	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/787,253	LADD ET AL.	
	Examiner	Art Unit	
	Kelly Mahafkey	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 January 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *34-79* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *34-79* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Amendments made 1/9/08 have been entered.
Claims 1-33 have been canceled.
Claims 34-79 are pending.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 35-57 and 65-69 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "sucrose equivalency" in claims 34, 45, 46 is a relative term which renders the claim indefinite. The term "sucrose equivalency" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what sweeteners would be equivalent to sucrose and as to which sweeteners would not be considered equivalent to sucrose.

Claim 35 recites, "The frozen dessert product of claim 34 wherein said pellet has a meting temperature of about -5C to about -10C". Claim 34 recites that the pellet remains single phase and does not fuse to another pellet from a temperature of about -28C to about -5C". It is unclear as to how the pellet can melt at a freezing temperature. It is unclear as to how the pellet can melt at a temperature below where one pellet would not fuse to another, because if the pellet were to melt, it would fuse to another pellet. Claim 47 is unclear for the same reason.

Claim 36 recites, "The frozen dessert product according to claim 35 wherein said pellet does not fuse to another pellet at the melting temperature of said pellet". It is unclear as to how a frozen dessert would not fuse with another dessert when it is melting. Furthermore, it is noted that claim 42 recites, "The frozen product according to claim 38 wherein said single phase pellet remains frozen at a temperature of about -5C

to about -10C". It is unclear as to how at one temperature can be the freezing and melting temperatures. Claim 48 is unclear for the same reasons.

Claim 37 recites, "The frozen dessert product of claim 34 wherein said pellet consist essentially of the premix." Claim 34 recites, "A frozen dessert product comprising a single phase pellet formed from a premix comprising..." It is unclear as to how claim 37 further limits claim 34. According to claim 34 the frozen dessert premix is comprising specific ingredients, and thus can include any other ingredients not listed in the claims, thus it is unclear as to how the frozen dessert would only consist of the premix, as the premix does not exclude the inclusion of any ingredient. It is unclear as to what would distinguish such other ingredients from being included as part of the premix or not part of the premix. For example, it is unclear if the artificial sweetener of claim 38 is included as part of the premix or if it conflicts with claim 37. Claim 49 is unclear for the same reason.

Claims 47-57 recite "The frozen dessert product of claim 46". The claims are unclear as claim 46 is directed towards a method of making a frozen dessert and not to a frozen dessert product.

Claims 65 and 66 recite, "vanilla ice cream premix". It is unclear as to what "vanilla ice cream premix" is.

Claims 67-69 recite, "chocolate ice cream premix". It is unclear as to what "chocolate ice cream premix" is.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 34-37 and 46-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jones (US 5126156) in view of Tomita et al. (US 5403611).

Jones teaches of a method for forming a pelletized dessert product comprising introducing a premix into a body of liquid cryogen (Column 2 lines 16-29). Jones teaches that the frozen dessert can be an ice cream product (Column 1 lines 10-15). Jones teaches that the final product is maintained in a freezer at about –29C if it is to be stored for periods greater than 30 hours, and that prior to serving, the product is kept at a temperature of about -23C to about -29C (Abstract, Column 2 lines 57 through Column 3 line 12). Thus one of ordinary skill in the art at the time the invention was made would expect the pellets as taught by Jones to maintain their individuality at a temperature of -23C (i.e. about -18C and about -20C) for at least less than 30 hours. Note: Claims 35, 36, 47, and 48 are unclear as stated above. As Jones teaches of a freezing temperature below the instantly claimed melting temperatures, the reference reads upon the instant claims. Jones teaches that the premix is a typical dairy composition, which can include typical ice cream flavorings, such as vanilla and chocolate, thus Jones teaches of a chocolate and vanilla premix for the frozen dessert (Column 4 lines 56-62).

Jones teaches the premix can be dairy based (Column 4 lines 56-62), however, is silent to the specific composition utilized to form the ice cream dairy dessert.

Tomita teaches that ice creams are generally made from 3-20% milk fat, 3-12% non-fat milk solids, 8-20% sugar, i.e. sucrose, and if necessary, a small amount of a stabilizer, an emulsifier, a color, flavors, and the like (Column 1 lines 45-64).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a premix comprising 3-20% milk fat, 3-12% non-fat milk solids, 8-20% sugar, and if necessary, a small amount of a stabilizer, an emulsifier, a color, flavors, and the like for the ice cream dessert product as taught by Jones. One would have been motivated to do so since Jones teaches of making a dairy based ice cream product but does not teach a composition for doing so, and since Tomita teaches of a general dairy based composition for ice cream products.

Claims 38-45 and 50-79 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jones (US 5126156) in view of Tomita et al. (US 5403611), further in

view of the combination of Cole et al. (US 4374154) and Igoe et al. (Dictionary of Food Ingredients, 3rd Edition 1996).

Jones in view of Tomita teach of an ice cream product premix that contains optional stabilizers and flavoring agents. The references, however, are silent to the specific optional ingredients, specifically a stabilizer and artificial sweeteners, that are included in the ice cream product as recited in claims 38, 50, 58, 63-75 and to the frozen dessert as remaining frozen about -5C to about -10C as recited in claims 42, 54, 76, and 79.

Cole teaches of an ice cream product with a similar composition to that as taught by Jones in view of Tomita. Cole teaches that the ice cream premix contains 0-2%, preferably 0.1-0.6%, stabilizers, including gums, in order to improve the shelf life of the ice cream product (Column 6 lines 19-32). Cole teaches that artificial sweeteners, including saccharin and aspartame, were added to the ice cream premix in order to adjust the sweetness of the final composition (Column 6 lines 51-62).

Igoe, page 14, teaches that aspartame is an artificial sweetener, which is utilized, in frozen desserts. Igoe teaches that aspartame is used at a level of 0.01-0.02%.

Regarding the ice cream premix as containing stabilizers, Cole teaches that preferably 0.1-0.6% stabilizers, including gums, are utilized in premixes for ice cream desserts in order to improve the shelf life of the ice cream product. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a premix comprising 0.1-0.6% gum (i.e. stabilizer) as taught by Cole in the ice cream dessert premix as taught by Jones in view of Tomita. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a conventional stabilizer in a conventional amount as taught by Cole. One would have been further motivated to do so in order to improve the shelf stability of the dessert product as taught by Cole.

Regarding the ice cream premix as containing an artificial sweeteners, Cole teaches that artificial sweeteners, including saccharin and aspartame, were added to the ice cream premix in order to adjust the sweetness of the final composition. It would

have been obvious to one of ordinary skill in the art at the time the invention was made to add an artificial sweetener, such as aspartame, to the ice cream premix as taught by Jones in view of Tomita in order to increase the sweetness level of the final product. It would have been further obvious to one of ordinary skill in the art at the time the invention was made to use 0.01-0.02% aspartame (i.e. about 0.25%, about 0.30%, about 0.4%) in the frozen premix as taught by Cole because it is a conventional amount of artificial sweetener to be used in a frozen dessert as taught by Igoe. It would have been further obvious to one of ordinary skill in the art at the time the invention was made to add more than 0.02% aspartame when desiring to increase the sweetness level of the final product. Furthermore, it would have been obvious to substitute one artificial sweetener for another artificial sweetener as to substitute one functional equivalent for another and would not make a patentable distinction to the claims. One of ordinary skill in the art at the time the invention was made would have been motivated to chose one artificial sweetener, such as sucralose, over another, such as aspartame, depending on which sweetener was most readily available and more affordable when the product was made.

Regarding the frozen dessert as remaining frozen about -5C to about -10C, the references teach of substantially the same method and composition for producing the frozen confection as instantly claimed, thus one of ordinary skill in the art at the time the invention was made would expect the frozen confection as taught by the references would have substantially the same properties as the frozen confection as instantly claimed; one of ordinary skill in the art would expect that the references teach of a frozen confection that remains frozen at about -5C to about -10C, absent any clear and convincing arguments and/or evidence to the contrary.

Response to Arguments

Applicant's arguments filed January 9, 2008 have been fully considered but they are not persuasive.

Applicant argues that the instant claims are distinguishable from the Dippin Dots product sold in the market. Applicant's argument is moot, as the claims were not

rejected over the Dippin Dots product sold on the market, but rather the patents and publications, as cited above.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). For example, applicant argues that Tomita and Cole do not teach of cryogenic freezing and that Jones does not teach of the claimed composition. These arguments are not convincing as the rejections were made over a combination of references and not over one of the cited references alone.

Applicant argues that the references of record do not teach of a frozen confection with the same properties as instantly claimed, such as a single phase pelletized dessert that can maintain shape without fusing at temperatures of about -28C to about -5C. Applicant's argument is not convincing as:

1. Applicant provides no evidence to support this statement; and
2. The references teach of substantially the same method and composition for producing the frozen confection as instantly claimed, thus one of ordinary skill in the art at the time the invention was made would expect the frozen confection as taught by the references would have substantially the same properties as the frozen confection as instantly claimed; one of ordinary skill in the art would expect that the references teach of a single phase frozen confection that remains frozen at about -5C to about -10C, absent any clear and convincing arguments and/or evidence to the contrary

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the duration of time which the frozen confection need maintain without fusing to another frozen confection) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read

into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/ /Kelly Mahafkey/

Primary Examiner
Art Unit 1794

Examiner
Art Unit 1794